



Freedom of services and trade unions: Could alliance be provided as a cross-border service?

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1. Introduction

One of the main strategic goals of the European Union is to create the internal market.¹ The core of this concept are the four fundamental freedoms, forming the macroeconomic model of a European-wide market system.² The freedom of establishment of nationals and companies of firms³ and the freedom of services⁴ are usually treated as freedoms provided for entrepreneurs and businesses. In Viking and Laval⁵ the Court of Justice of the European Union solely interpreted these freedoms on the side of the involved undertakings, juxtaposing them with the fundamental rights of trade unions.⁶ It is challenging to examine, whether trade unions could also refer to Article 56 or Articles 49, 55 of TFEU, when they exercise trade union rights, especially industrial actions to counter employers' power in cross-border industrial conflicts. This article assesses the possibilities of trade unions to rely on the freedom to provide services from two angles: first from the point of view of European law, and second from the aspect of the solidarity principle.

I argue that creative reading of European law would be highly beneficial for trade unions to regain strengths, however, even the most innovative legal interpretation would not be enough for a major breakthrough. Provisions for freedom of services in TFEU have very limited potential to enhance genuine trade union activity on its own. If trade unions wish to provide collective bargaining and

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¹ Treaty on European Union (TEU), Article 3(3), Treaty on Functioning of the European Union (TFEU), Article 26 (2).

² C. BARNARD: *The Substantive Law of the EU. The Four Freedoms*. OUP, (5th Ed.) 2016. 9.

³ TFEU Articles 49, 55.

⁴ TFEU Article 56.

⁵ Case C-438/05, ECR 2007, I/10779 – Viking, para 44; Case C-341/05, ECR 2007, I-11767 – Laval, para 91.

⁶ Freedom of association, Article 12 CFREU, Right of collective bargaining and collective action, Article 28 CFREU.

strike as a service, it is crucial to understand the socio-psychological background of collective actions, the motivation and the conditions of employees, which make them support a movement in a polarized environment. To be able to provide effective services and maintain members' commitment, trade unions must deliver results in a fragmented legal environment.

Perhaps a reverse approach could deliver better results: it is not the innovative interpretation of European law that nurtures solidarity, but solidarity could be better fostered among trade union members if backed up by legislative changes in EU law, especially on strike activities. The overarching belief of European labor law arguing, that any trans-border activity shall be implemented in accordance with national law and industrial relations practices in individual Member States to ensure their effectiveness, might be overcome. It is necessary to break through the limits of TFEU 153(5) and to create a level playing field across borders. Without harmonized, mutually recognized, and enforceable European rules, trans-border services for interest representation would hardly sell among workers.

2. Trade unions as trans-border service providers

First, it will be assessed, to what extent that freedom of services could be used by trade unions to attract new members from other Member States than their home state, by offering trans-border services. Thus, it would be necessary to examine, whether trade unions qualify as service providers under European law. For this purpose, the two major functions of trade unions – collective bargaining and assistance – should be examined separately.

Article 56 TFEU guarantees the freedom to provide services and prohibits restrictions in respect of nationals of Member States, who are established in a Member State other than that of the person for whom the services are intended. Article 57 TFEU gives the definition of services within the meaning of the Treaties, where it is normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement of goods, capital and persons. Furthermore, a transnational element of the service is required. These requirements are interpreted rather broadly. The 2006 Services Directive⁷ provides for the freedom to receive trans-border services, specifically Article 20 confirms, that discrimination against the service recipient on the basis of nationality is prohibited. The Services Directive does not exclude trade unions from its scope, however, it is heavily contested, whether trade unions are service providers.

An activity is considered 'economic', when it is not provided as public service, but it is operated in a market-like environment. Profit making is another element of services. Regarding collective bargaining, trade unions bundle and organize economic power, and serve as an agent of their members pursuing economic advantages. It could be argued, that trade unions are not intended to make profit

⁷ Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] *O.J.* L376/36.

for their members, yet they are not exempted from financial risks associated with collective bargaining.⁸ Thus, it would be – at least theoretically – possible for trade unions to ‘sell’ their services abroad, gaining more power through an enlarged membership and providing services for employees in countries, where trade union activism is generally weak.

It is clear from the case law of the Court of Justice of the European Union, that trade unions are not undertakings, when engaged in collective bargaining, for the purpose of competition law (TFEU Article 101).⁹ Disputably in *Becu* it was argued by AG Colomer, that trade unions could be regarded as undertakings, where they conduct themselves in matters of trade, like an entity capable of being regarded as an undertaking.¹⁰ On the other hand, in *Becu* the Court only states, that even when acting collectively, workers cannot be said to be undertakings, but the discussion is not, whether a trade union is or is not an undertaking.

The other main role of trade unions is to provide assistance to workers by representing them within the employing enterprise, to offer guidance and training, and to offer legal assistance and counseling in disputes related to their employment. Whilst these activities are not aimed at making profit, they come at cost and are offered in a competitive environment: if workers are not satisfied with trade union’s services, they can opt for the representation offered by another union.

Even though trade unions could be recognized service providing economic entities in the context of TFEU Article 56, it might not be enough to successfully ‘run’ this business. The success of collective actions much depends on community support in a workplace and in society as a whole. Collective bargaining, as a service provided by trade unions, could help increasing union membership and raising representativeness, but that alone would not build community among workers. As labor is not a commodity, solidarity cannot be sold as a connected service either. Analysis of the changes concerning the solidarity principle is, therefore, necessary to explain, why any innovative interpretations of European law is insufficient for trade unions to regain their strengths.

2. Changes in the Principle of Solidarity

Due to structural transformation of capitalism, collective action and collective consciousness have been going through remarkable changes all over in Europe. Material, institutional and mental frameworks of collective action have diminished, and individual actors have become the drivers of societal changes.¹¹ In times, when individuals are on a quest for survival in a multiple battlefield identity crisis and isolation might occur, existential fear does not have power to create genuine group cohesion.

⁸ See *Pavlov v Stichting Pensioenfonds Medische Specialisten* (Joined Cases C-180-184/98) [2001] 4 C.M.L.R. 1., where the Court held that an undertaking ‘must assume the financial risks attached to the pursuit of the activity.’ [76].

⁹ See *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* (Case C-67/96) [2000] 4 C.M.L.R.; *Criminal Proceedings Against Jean Claude Becu* (Case C-22/98) [2001] 4 C.M.L.R. 96.

¹⁰ See *Becu* (Case C-22/98) [1998] 4 C. M L. R. 26 [25]-[26]; [AG57].

¹¹ B. LAHIRE: *The Plural Actor. Polity*, 2011.

However, these explanations cannot provide answers how solidarity could be rebuilt in society. There are tools, which could help individuals in finding their ways in everyday life, such as the system of collective bargaining and interest reconciliation, which are institutionalized intermediations between equality needs and unequal distribution. Yet it is increasingly difficult for trade unions to gain trust from workers.

Despite the fact, that social dialogue has helped mitigating the effect of the economic crisis due to measures laid down in collective agreements or other forms of company agreements,¹² trade union density has been declining in almost all Member States of the European Union.¹³ The drop in unionized workers is even more evident in Central and Eastern Europe (CEE), where recent changes in the political and legal environment have created a rather hostile atmosphere for social partners. To stop this drawback and to regain membership, trade unions would desperately need to intercept new target groups and introduce new services. Innovative collective agreements could be a possible new operational terrain for the unions to gain ground in collective bargaining, as these new generation agreements are focusing on win-win strategies, that are equally serving the interests of the company in terms of flexibility, productivity and competitiveness, at the same time improving the quality of employment conditions.¹⁴

However, it seems that this capacity is not there, and trade unions, especially in CEE are not ready for this paradigm change. In these countries, the heavy burden, what trade unions have been carrying from the state-socialist past, was mounted by the State's unwillingness to create or maintain favorable conditions to establish genuine social dialogue. Therefore, the scope of collective agreements (where they exist) remained very limited, concentrating mostly on traditional wage-related benefits, and innovative content is technically missing from them.

If trade union rights under TFEU articles 49 and 56 were recognized and they met with business rights to provide innovative services, like insurance schemes, health care services or welfare benefits, would they be able to regain support from employees and would they be strong enough to break out from their national frames and to hit the European market? Unlikely. The cement of trade union activity is solidarity and to create solidarity requires much more than an appealing portfolio of services.

In his seminal work, Durkheim¹⁵ outlined two theories to explain how social order and solidarity are established and maintained.¹⁶ Durkheim differentiates between mechanical and organic solidarity.

¹² S. CLAUWAERT – I. SCHÖMANN: *European social dialogue and transnational framework agreements as a response to crisis?* Brussels, ETUI Policy Brief, 4, 2011.; S. CLAUWAERT – I. SCHÖMANN – W. WARNECK: *The European interprofessional and sectoral social dialogues and the economic crisis in Benchmarking Working Europe 2010*. Brussels, ETUI, 2010.; V. GLASNER – B. GALGÓCZY: *Plant-level responses to the economic crisis in Europe*. Brussels, ETUI-REHS, 2009.

¹³ For detailed analysis see: <http://www.worker-participation.eu/National-Industrial-Relations/Across-Europe/Trade-Unions2> (last retrieved on 12 October 2016).

¹⁴ SENATORI ET AL.: *Going up the high way: Rethinking the role of social dialogue in welfare and competitiveness*. *Quaderni Fondazione Marco Biagi*, 26. 2015.

¹⁵ E. DURKHEIM: *The Division of Labour in Society*. [1893] New York, Free Press, 1964.

¹⁶ *Ibid.*

In his terms, mechanical solidarity refers to connection, cohesion, and integration arising from homogeneity, or similar work, education, religiosity, and lifestyle. Mechanical solidarity is present in small-scale, so called traditional societies, and it is often seen as a function of individuals being submerged in a collective consciousness. Organic solidarity on the other hand is created by the interdependence of individuals in more advanced societies, particularly by professional dependence. It is argued, that even though individuals perform very different roles in an organization, and they often have different values and interests, there is a cohesion arising from the compartmentalization and specialization woven into what we call modern life.

Durkheim also states, that if society was merely a resultant of individuals put together and connected by a temporary contractual relationship for the fulfillment of their immediate needs, that if the typical connections between them were of economic nature, then it would no longer be a society, but “Hobbes’s state of nature.”¹⁷ On the other hand Durkheim’s concept on unidirectional evolution has to be received with caution. Durkheim found the “determining causes” of higher level of division of labor in the more advanced level of social interaction. In his views, the demographic change was associated with increased social interaction, leading to a more complex – modern – society.

Due to the structural transformation, triggered by capitalism, the nature of collective consciousness and collective actions has changed remarkably.¹⁸ Traditional forms of work and institutional ties have been diminishing; individuals face increased challenges in developing their own career path. Individualization, mobility and flexibility are the most lucrative strategies in an ever changing economic and social environment, and traditional forms of unionization could not respond to polarized individual needs either. Individuals are pressurized from great many directions and forced to enroll to multiple social groups, which are heterogeneous and often contradictory.¹⁹ The mental and institutional framework of collective actions have weakened too, leaving those behind, who could not live up to the new requirements, became increasingly marginalized, and would need more support in adapting to the new social environment. Traditional elements of working class-consciousness, such as solidarity or mutual support, have been replaced by the need that actors should define themselves through various self-narrations and act individually to represent their own interests in a pluralistic way.²⁰

Deprivation from class-consciousness caused that common actions, rituals, and habits were lost as well. The working class is not only missing from the political discourse, but also from daily narratives, depriving its actors from a common understanding of their place in the social order, thus reinforcing an identity crisis through ontological issues.²¹ This forced identity redefinition plays a crucial role, when we try to explain, why trade union movement has lost its strength. When estab-

¹⁷ R. K. MERTON: Durkheim’s Division of Labor in Society. *Sociological Forum*, 9, 1., 1994. 18.

¹⁸ L. BOLTANSKI – E. CHIAPELLO: *The New Spirit of Capitalism*. Verso, 2006.

¹⁹ LAHIRE op. cit.

²⁰ Ibid.

²¹ FLECK, Z. – KISS, V.: Kollektív érdekérvényesítés és igazságosság. *Munkaügyi Szemle – Stúdium*, 2016.

lished patterns for group cohesion are lost, alternative moral and ideological narratives step in to help the individual to recreate its identity. These ready-made symbols, however, are not capable to replace genuine intra-group cohesion, and are not able to create mutual interest recognition either.²² In times of existential fear, these newly learnt behavioral patterns are not creating solidarity, but are rather emphasizing differences from others, usually on a racial or national basis.²³ Self-identification becomes easier, if the individual could create plural and identities parallel to each other contemplating with the different roles the individual needs to play, especially if these roles are partially or completely contradictory to each other. Thus, these parallel identities represent one segment of an individual but due to their contradicting nature they bound an individual to a more simplistic understanding of social interaction. Thus, from the level of organic solidarity, the individual steps down to the level of mechanic society, where people are bound together through more straightforward connections, such as religion, nation or profession.

When it comes to social movements, organizations meet increased difficulties to address individuals in general and trade unions in special. With the disappearance of classes, working life is only one of the roles an individual plays, over-individualization does not allow people to afford interdependence and complementarities essential for organic solidarity. In post-socialist countries, the organizational declining of trade union could be – at least partially – explained by the weakening of industrial production, by the advancement of neoliberal economic policy or by the lack of social partnership, mounted by the historical burden trade unions carry.²⁴

However, these factors do not sufficiently explain, why new roles and symbols went missing in the course of reinterpretation of the function of working class in the new social order.²⁵ Individual actors' potential to act to challenge social order is interconnected with a group's willingness to cooperate, negotiate and protest or refer to collective actions.²⁶ However, this cohesion between individuals and their group could be jeopardized, if there is no common perceptive of threats or of circumstances which are interpreted as injustice or deprivation. In order to act collectively, there should be a common understanding on values, inequality, injustice and autonomy to be able to define a group. Due to the over-individualization, over-polarization and pluralistic self-identification, there are no shared definitions.

²² A. SWIDLER: Culture in Action: Symbols and Strategies. *American Sociological Review*, Vol. 51., April, 1986. 273–286.

²³ FLECK-KISS op. cit.

²⁴ MARTIN (2011) op. cit.

²⁵ C. DANIEL – E. AROGLOU – M. LAMONT: European workers: meaning-making beings. *Comparing European Workers PARTicle B: Policies and Institutions. Research in the Sociology of Work*, Vol 22., 2011. 287–312.

²⁶ Durkheim had an opposite view, he claimed that the strength of the individual and that of society are inversely related. *The Rules of Sociological Method* ([1894]1982), F. BOWRING: The individual and society, in Durkheim: Unpicking the contradictions. *European Journal of Social Theory*, Vol. 19(1), 2016. 21–38.

It is argued, that in (re)creating group identity, social actions (like strikes) are indispensable, as they bring together organized members of trade unions by creating common goals worth to strive for.²⁷ Next the role of collective actions is analyzed as a tool to create solidarity.

3. Collective Actions and Solidarity

Social psychology in its classical terms helps to define the motivation and conditions under which individuals chose to join a group to protect their interest. The motivation is present in case the group members are bound together by mechanical solidarity. Therefore, it is important for trade unions to understand how to address people in the stage of mechanical solidarity in order to mobilize them through collective actions.

The focal point of any collective action is social identity. Social identity is a person's sense of who they are based on their group membership(s). These groups are important sources of pride and self-esteem, a sense of belonging to the social world.²⁸ In case the group's dominant social evaluation is negative or its members are discriminated, individual members could either leave the group or refer to other resources to keep up positive self-esteem. However, if group cohesion is strong enough, members could collectively strive to change external perception toward the group.²⁹ Collective actions have important implications to social movements. Collective actions are those, when – regardless of the numbers of actors – group members are acting on behalf of the group to improve the conditions of the entire group, and not those of the individuals.³⁰ The major motivation for collective actions could be the recognition that the group suffered a loss or has a disadvantageous situation compared to similar groups. It is also necessary, that the source of this deprivation could be identified and the possible actions to change the situation could be detected. It should be therefore important to understand how trade unions could promote collective actions within the group.

Effective trade union activity is based on two pillars: to recruit members and to mobilize them.³¹ To achieve this, trade union needs to give members (or future members) to believe that it represents their social group, with other words trade union is composed of people who suffered the same loss, deprivation or injustice to create social identity. Empowering trade unions with the prerogatives

²⁷ KENDE, A.: Szociálpszichológiai kérdések a szakszervezetekhez csatlakozás, a szakszervezetek iránti bizalom és a szakszervezeti mozgósítás szempontjából. *Munkaügyi Szemle – Stúdium*, 2016.

²⁸ H. TAJFEL – J. C. TURNER: *An integrative theory of intergroup conflict. The social psychology of intergroup relations?* 1979. 33., 47.

²⁹ S. A. HASLAM – N. ELLEMERS – S. D. REICHER – K. J. REYNOLDS – M. T. SCHMITT: The social identity perspective today: An overview of its defining ideas. In: T. POSTMES – N. R. BRANSCOMBE (eds): *Rediscovering Social Identity: Core Sources*. New York, Psychology Press, 2010.

³⁰ S. C. WRIGHT – D. M. TAYLOR – F. M. MOGHADDAM: Responding to membership in a disadvantaged group: From acceptance to collective protest. *Journal of Personality and Social Psychology*, 58, 1990. 994–1003.

³¹ KENDE (2016) op. cit.

provided for by Article 49 and 56 could help trade unions to identify group needs and recognize the deprivation, loss or injustice to create necessary cohesion for a group.

Trade unions could also guarantee an appropriate comparator for group member. It has an utmost importance to define an adequate counterpart with whom the situation of group members is comparable. Without adequate comparator, it is difficult to explain why it is worth fighting for the goals of the group. For example, if the comparator encounters greater loss than the group or the members of the comparator are unemployed, the group is not able to realize or identify injustice, despite the objective deprivation. Therefore, relative deprivation is strongly interconnected with macroeconomic trends, which give context to collective actions. But in case the group compares its situation to another employee group, the problem of relative deprivation described above could be eliminated, as the comparator would be a group of people in similar situation (e.g. employees) and not one with significantly worse traits, like jobless people. The identifiable goals, like better working conditions, higher job security, social security and the like are clear and easy to communicate with group members. If individuals could identify themselves with the group and therefore group cohesion is sufficiently strong, even if the group suffers certain loss, individuals may not consider leaving the group but may take collective actions to strive for the betterment of the group.

However, creating common goals are not enough for trade unions to unite members. In order to keep members motivated, there should be a clear understanding on how these goals could be achieved and what actions are needed to protect them. On the other hand, these collective actions also have to be accessible to all members of the group, otherwise motivation created by the shared opinion among members is lost. Therefore, it is not enough to empower trade unions and provide them with the freedom of services to create trans-border membership through appealing services and to offer a special social cohesion for their members, but they should also be empowered with collective action to mobilize members across borders.

4. The missing element: The right to trans-border strike

Company-level bargaining has gained growing significance in many European countries, and this may pave the way to the creation of a favourable environment for innovative strategies and regulatory solutions responding to the needs of both employers and employees, in a “win-win” scenario and fostering competitiveness and quality employment.³² However, there is another trend especially in the post-socialist countries, that the background conditions for collective bargaining have been weakening and governments have created a rather hostile environment for social dialogue. For example in Hungary recent reforms have reduced the role of the social partners in tripartite relations with the government, weakened the legal prerogatives of trade union officers in the workplace, and allowed

³² SENATORI ET AL. (2015) op. cit.

exemptions from certain legal provisions to be laid down in individual contracts, thus reducing the incentive to bargain collectively.³³

The right to strike is an essential element to protect human dignity of workers.³⁴ However, even if trade unions manage to overcome normative and procedural obstacles and a trans-border strike is organized, these international solidarity actions often labeled as unlawful. Tonia Novitz ads, that by leaving the regulations in the competency of Member States, the EU pushes the responsibility on national lawmakers to properly implement ILO standards regarding industrial action.³⁵ On the other hand, the EU requires Member States to meet convergence criteria and have tight macroeconomic policies with regard to public spending and wages, and these policies are necessarily influence national collective bargaining. Thus, the right to strike enshrined in the Charter of Fundamental Rights of the EU (Article 28) is technically not recognized by the EU.³⁶

The European Court of Human Rights noted, that the right to strike is one important means by which union members protect their occupational interest. There are also other avenues,³⁷ but it failed to describe, what these other forms of protest are. Notwithstanding, later on in the *Demir and Baykara* and *Enerji Yapi-Yol Sen* judgments³⁸ the ECtHR gave full protection to the right to collective bargaining and collective action under Article 11 ECHR with extensive reference to the standards of the ILO and the European Social Charter.

The importance of strike as an integral part of social dialogue, and the reasons why the European Union should actively protect this right, have been analyzed elsewhere in depth, and so are only remembered here. As Bob Hepple pointed out, power unbalance between employers and employees caused by accumulation of capital could be outweighed by the power of workers acting in solidarity.³⁹ Since management has the right to relocate or even shut down production to demonstrate power, a legal regime which does provide a fully-fledged right to strike puts the workers at the “mercy of their employer”– argues Otto Kahn-Freund.⁴⁰

5. Conclusions

I argued that trade unions could be treated as service providers in accordance with the Treaties’ provisions. I also found probable, that trade unions when engaged in collective bargaining could be

³³ Ibid.

³⁴ Ibid.

³⁵ T. NOVITZ: EU and the Right to Strike: Regulation through the Back Door and Its Impact on Social Dialogue. *The King’s Law Journal*, Vol. 27, Issue 1, 2016. 46–66.

³⁶ Ibid.

³⁷ *Schmidt and Dalstrom v Sweden*, App No 5589/72, [1976] ECHR 1.

³⁸ *Demir and Baykara v Turkey*, ECtHR (Grand Chamber) 12 November 2008, Appl. No. 34503/97; *Enerji Yapi-Yol Sen v Turkey*, ECtHR 21 April 2009, Appl. No. 68959/01.

³⁹ B. HEPPLÉ: The Right to Strike in an International Context, *Canadian Lab. & Emp. L.J.*, 15, 133., 2009–2010.

⁴⁰ O. KAHN-FREUND – B. HEPPLÉ: *Laws Against Strikes*. [Fabian Research Series 305] London, Fabian Society, 1972. 8.

considered undertakings as collective bargaining is a kind of economic activity and trade unions bear the financial risks of this activity. Assistance services provided by trade unions would also fit in the concept of EU internal market law. Therefore, trade unions could rely on Treaty regulations concerning the freedom of services when providing services to employees working in other Member States.

Furthermore, I argued that offering services for employees in other Member States, where labor law provisions are less favorable, is not sufficient to enlarge membership and increase the power of trade unions. Without sufficient group cohesion, trade unions could not effectively operate and represent the interest of their members up and against employers. In times when the principle of solidarity has been changed and individuals are more likely to step down to the level of mechanical solidarity in a durkheimian sense, the most important function of trade unions is to provide stepping stones for their members of self-esteem and to help them to recreate their social identity. As a part of this function, trade unions need to demonstrate, how shared goals could be achieved through collective actions.

The European Union is committed to enhancing labor protection across the EU, and combatting social dumping could use the existence of a freedom to provide trade union services on a trans-border manner, and there would possibly not obstacle workers to shop for these services, even though without clear legal provisions and established case law it is difficult to imagine, how trans-border trade union services could be developed in a legally certain way. On the other hand, European law recognizes the right to strike only in accordance with national laws, but as demonstrated through its case law, the Court of Justice of the European Union has not given priority to transnational collective actions over freedoms provided for businesses.

The mere possibility to leverage on freedom to provide trans-border services would not be enough for trade unions to expand their membership and therefore represent more substantive power during collective bargaining. To enhance labor protection across the European Union and to combat social dumping, trade unions ought to be able to mobilize their members across borders. For that purpose it is indispensable for the European Union to overcome the restrictions laid down in TFEU Article 153 (5) and extend its competency to regulate collective bargaining along with the right to strike on transnational level. It is crucial for trade unions to have basic standards for their activity laid down in *erga omnes*, enforceable regulations, otherwise their freedom to provide services in a trans-border manner remains empty.